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No. 87-1986

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD LEE COLZIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
EDWARD S.G. DENNIS, JR.
Acting Assistant Attorney General
DEBORAH WATSON
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals applied the correct standard of review in reversing the district court's determination that petitioner's arrest was not supported by probable cause.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 31-35) is not yet reported. Two prior decisions of the court of appeals (Pet. App. 36-55) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1988. The petition for a writ of certiorari was filed on June 3, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial on stipulated facts in the United States District Court for the Eastern District of Virginia, petitioner was convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1).

He was sentenced to three years' imprisonment and a three-year special parole term.

1. The district court held a pretrial hearing on petitioner's motion to suppress certain evidence obtained following his arrest. The evidence at that hearing established that on September 4, 1985, Drug Enforcement Administration (DEA) agent John Lee, who had more than 10 years' experience with the DEA, was at Washington National Airport looking for evidence of illegal drug trafficking. During the late afternoon, Agent Lee observed petitioner arrive on a flight from Miami, Florida, and meet with an individual later identified as Lou Scandal. The following morning, Agent Lee and two other DEA agents saw petitioner arrive at the same airport on another direct flight from Miami. Co-defendant William Welch left the plane about six passengers behind petitioner. Petitioner and Welch both carried small carry-on bags. Welch caught up to petitioner, and the two men walked into the main terminal together, where they were joined by Scandal. Pet. App. 39; Tr. 6-10.

Agent Lee and one of the other agents approached the three men as they were about to leave the terminal and asked to speak with them. Petitioner and Welch agreed to speak with the agents, but Scandal continued to walk out of the terminal. The agents identified themselves to petitioner and to Welch, displayed their credentials to them, and explained to them that their purpose was to interdict drugs coming into the Washington metropolitan area. Petitioner and Welch responded that they had come from Miami, and Welch provided an airline ticket in the name "Johnson." When Agent Lee asked Welch his name, Welch hesitated at first, but then replied "Williams." When asked for identification, Welch replied that he had none. Agent Lee then asked whether either petitioner or Welch was carrying cocaine. Welch denied that he was

carrying cocaine; petitioner did not respond. Both petitioner and Welch appeared nervous. Pet. App. 40.

Agent Lee searched Welch's bag; inside the bag he found a box containing cocaine. Agent Lee arrested Welch and, after petitioner acknowledged that he and Welch were traveling together, the agents arrested petitioner. An agent then searched petitioner's bag and found a baby-powder bottle inside the bag. The agents took petitioner and Welch to the FAA office at the airport, where they opened the baby-powder bottle and discovered cocaine inside. Following his arrest, petitioner made an inculpatory statement to the DEA agents. Pet. App. 40-41; Tr. 11-17.

2. The district court granted petitioner's motion to suppress both the cocaine and petitioner's post-arrest statement on the ground that the evidence was the fruit of an unlawful arrest. According to the court, the DEA agents lacked probable cause to arrest petitioner at the airport (Pet. App. 37; Tr. 74-75). The evidence before them at that time established, the court found, only that petitioner was present at the scene (Tr. 74-75).

3. The court of appeals reversed (Pet. App. 36-51).[1] The court agreed with the district court that " 'mere presence' at the scene of a crime, or in the company of those engaged in crime, does not, *by itself,* establish probable cause" (Pet. App. 42 (emphasis in original; citations omitted)). The court of appeals disagreed, however, with the district court's determination that none of the other facts relied upon by the government supported a finding of probable cause (*id.* at 45-51). Those facts included: (1) petitioner's two trips, within 24 hours, from Miami; (2)

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[1] The court of appeals initially remanded the case to allow the district court to determine whether the agents' search of petitioner's bag was consensual. On remand, the district court found that petitioner had not consented to the search. Pet. App. 52-55.

that Scandal, the man who greeted petitioner on both occasions, did not stop when the agents approached and questioned petitioner and Welch; (3) petitioner's "excessive" nervousness; and (4) petitioner's admission, after the discovery of Welch's cocaine, that he and Welch were traveling together (*id.* at 45-47). The court of appeals explained that "[a]lthough each may also be susceptible of innocent explanations, that does not deny the validity of the assessment of them in aggregate to constitute probable cause" (*id.* at 49).

ARGUMENT

Petitioner contends (Pet. 10-20) that the district court's probable cause determination was a factual finding reviewable only for clear error, and that in reversing the district court's ruling, the court of appeals improperly substituted its view of the facts for that of the district court.

We submit that the question whether an arrest is supported by probable cause is a mixed question of law and fact, that is, a question "in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [legal] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard* v. *Swint,* 456 U.S. 273, 289 & n.19 (1982). To be sure, a district court's findings of "historical facts" may be reversed on appeal only where they are found to be "clearly erroneous." See, *e.g., Maine* v. *Taylor,* 477 U.S. 131, 145 (1986). On the other hand, the review of the district court's application to those facts of the legal standard of probable cause involves a question of law. Accordingly, on that issue appellate review is not similarly circumscribed. Cf. *Ker* v. *California,* 374 U.S. 23, 33-34 (1963) (reason-

ableness of a search); *Miller* v. *Fenton*, 474 U.S. 104, 110, 117 (1985) (voluntariness of a confession).

Petitioner claims (Pet. 12-17) there is a conflict among the circuits on the question of the proper standard for courts of appeals to employ in reviewing district court rulings on the existence of probable cause. In making that claim, petitioner confuses the standard of review applicable to factual findings that underlie the probable cause determination and the ultimate conclusion as to whether the facts as found are sufficient to constitute probable cause. The former is a factual question subject to review under the clearly erroneous rule, while the latter is a legal question subject to de novo review. Thus, the cases petitioner cites from the First, Second, Third, Fifth, Eleventh, and District of Columbia Circuits (Pet. 13 n.4) all stand for the proposition that a district court's factual findings that are made as part of the determination of the existence of probable cause are subject to review under the clearly erroneous test. Those cases do not stand for the quite different proposition that the question whether the facts as found amount to probable cause is likewise reviewable under the clearly erroneous test.

With respect to the latter question, several circuits have held that the question whether particular facts constitute probable cause is a legal issue subject to de novo review by the court of appeals. See *United States* v. *Thomas*, 835 F.2d 219, 222 (9th Cir. 1987); *United States* v. *Lima*, 819 F.2d 687 (7th Cir. 1987); *United States* v. *Alfonso*, 759 F.2d 728, 741 (9th Cir. 1985); *United States* v. *McKinney*, 758 F.2d 1036, 1043 (5th Cir. 1985); *United States* v. *Freeman*, 685 F.2d 942, 948 (5th Cir. 1982). Petitioner contends (Pet. 12) that this line of cases conflicts with the decision of the Sixth Circuit in *United States* v. *Pepple*, 707 F.2d 261, 263 (1983).

Although the Sixth Circuit did state in *Pepple,* incorrectly in our view, that the trial court's determination that certain facts constituted probable cause was binding unless "clearly erroneous," it is not clear that that case represents the present view of the Sixth Circuit on the issue. First, the *Pepple* case has not been followed or even cited by the Sixth Circuit or any other circuit in any published opinion. Second, in reaching its conclusion on the appropriate standard of review, the *Pepple* court relied on two Ninth Circuit decisions, *United States* v. *O'Connor,* 658 F.2d 688, 690-691 (1981), and *United States* v. *Hart,* 546 F.2d 798, 801-803 (1976) (en banc), cert. denied, 429 U.S. 1120 (1977), both of which held that appellate review of a district court's probable cause determination is governed by the clearly erroneous standard (see 707 F.2d at 263).[2]

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[2] The Sixth Circuit in *Pepple* also cited the Eighth Circuit's decision in *United States* v. *Wentz,* 686 F.2d 653, 656-657 (1982) (citation omitted), in which that court stated that a "district court's finding of probable cause for the warrantless arrest of [the defendant] must be upheld unless clearly erroneous." Subsequent Eighth Circuit decisions contain similar statements (see, *e.g., United States* v. *Martin,* 833 F.2d 752, 754 (1987); *United States* v. *Woolbright,* 831 F.2d 1390, 1393 (1987); *United States* v. *Love,* 815 F.2d 53, 54 (1987), cert. denied, No. 87-5121 (Oct. 5, 1987)). Other Eighth Circuit decisions, however, show that in applying its "clearly erroneous" standard, the Eighth Circuit, like other circuits, reviews the district court's findings of fact only for clear error, but undertakes de novo review of the district court's conclusions of law, including its application of the correct legal standard to the facts. See *United States* v. *Reiner Ramos,* 818 F.2d 1392, 1394 (1984) (citations omitted) ("[A] finding is clearly erroneous * * * if we conclude that the district court's determination * * * reflects an erroneous view of the applicable law."); *United States* v. *Reivich,* 793 F.2d 957, 961 (1986) (citations omitted) ("Although absent clear error we are bound by the district court's findings of fact regarding the circumstances of [the defendants'] statements, we may reverse if that court's ultimate ruling on suppression reflects an erroneous view of the applicable law."); *United States* v. *McGlynn,* 671 F.2d

The Ninth Circuit, however, has more recently abandoned its prior position and now holds that de novo review is appropriate. See *United States* v. *McConney,* 728 F.2d 1195, 1202-1203 (en banc), cert. denied, 469 U.S. 824 (1984). The overruling of the Ninth Circuit decisions on which the Sixth Circuit relied in *Pepple* might well persuade the Sixth Circuit not to follow the *Pepple* case if the occasion arises to reconsider that decision. Finally, in two cases decided after *Pepple,* the Sixth Circuit has taken positions that appear contrary to the approach taken in the *Pepple* case. In *United States* v. *McManus,* 719 F.2d 1395, 1397 (1983), the Sixth Circuit held that the question of the sufficiency of an affidavit to establish probable cause is a question of law not subject to the clearly erroneous rule. And in *United States* v. *Oswald,* 783 F.2d 663 (1986), the Sixth Circuit recognized that an analogous Fourth Amendment issue—the question of abandonment—raises a mixed question of law and fact and that in that context the clearly erroneous standard applies only to the district court's underlying factual findings.

Even if there is a continuing conflict among the circuits on the issue of the proper standard of review of probable cause determinations, this case is not a proper vehicle for resolving that conflict. The court of appeals, in its unpublished opinion, did not rely upon or even refer to the appropriate standard of review. Rather, the court of appeals reversed the district court because it held that the district court had made a clear error of law by refusing to attach any weight to petitioner's admission that he was traveling with William Welch, who was found to be carrying cocaine. As the court of appeals explained, facts may be sub-

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1140, 1143 (1982) (validity of warrantless arrest) ("Where as here the facts are essentially undisputed, in determining whether an erroneous conception of law is involved or whether upon the record as a whole a mistake has been made, this court may apply the law to those facts.").

ject to innocent explanations, but "that does not deny the validity of the assessment of them in aggregate to constitute probable cause" (Pet. App. 49). Because the district court's probable cause analysis was flawed from the outset by a fundamental legal error, the court of appeals could properly choose between remanding the case for a further determination by the district court applying the proper legal principles, or simply drawing its own conclusion as to whether probable cause was established.[3] See 28 U.S.C. 2106. The court of appeals chose the latter course, and in so doing did not have to choose between reviewing the district court's determination on a de novo or clearly erroneous basis.[4]

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[3] Contrary to petitioner's claim (Pet. 17, 19, 20-28), the court of appeals did not reject any of the district court's factual findings (the district court having accepted Agent Lee's testimony). Instead, as we have noted, the court of appeals simply rejected the district court's ruling that certain of those facts were not legally relevant to the question whether probable cause supported petitioner's arrest (see Pet. App. 45-49).

[4] Perhaps the best demonstration that the Fourth Circuit in this case did not take a legal position contrary to that taken by the Sixth Circuit in *Pepple* is that the court of appeals actually cited *Pepple* as supportive of its conclusion that the agents had probable cause in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General
EDWARD S.G. DENNIS, JR.
Acting Assistant Attorney General
DEBORAH WATSON
Attorney

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